

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.
FIRST APPEAL NO.970 OF 1995.
WITH
FIRST APPEAL NO.1075 OF 1995.

Tehmtan s/o Ardeshir Bomanji

Irani & ors. : Appellants.

versus

The Municipal Corporation of

Greater Bombay & ors. : Respondents.

Mr.V.B.Naik for the appellants.

Mr.N.V.Walawalkar with Mr.J.J.Xavier for the
BMC/Respondent No.1.

Mr.G.S.Godbole for Respondent Nos.2A to 2D.

CORAM : D.G.DESHPANDE, J.

DATED : 30th September 2005.

JUDGEMENT :

1. Heard learned counsel Mr.Naik for the appellants, Mr.Walawalkar for the BMC and Mr.Godbole for Respondent Nos.2A to 2D. Both the

appeals are filed by the original plaintiffs. They arise out of two suits. These plaintiffs had filed a suit vide Long Cause Suit No.1914 of 1983 before the City Civil Court, Bombay and, thereafter they filed another suit vide Long Cause Suit No.1877 of 1985. First Appeal No.970 of 1995 is arising out of the first suit and First Appeal No.1075 of 1995 is arising out of the second suit. [I am referring the suits as 1st suit and 2nd suit and referring the parties plaintiffs and defendants because the plaintiffs and defendants are common in both the suits, though their number may change sometime].

2. The dispute between the plaintiffs and defendants is about the immovable properties known as Irani Wadi situated at Mazgaon. The BMC/Respondent No.1 came into picture in this dispute when they transferred the tenancy of this Irani Wadi in favour of original defendant No.2 who died during pendency of the suits and his legal heirs are now representing him. The 1st suit relates to the action of the BMC in transferring the tenancy in the name of Defendant No.2. The 2nd suit is in respect of subsequent developments that took place after transfer of

tenancy in the name of defendant No.2. Fate of the 2nd suit depends upon the fate of the 1st suit. Both the suits of the plaintiffs were dismissed by the City Civil Court. It is the assertion of the plaintiffs that they are the joint tenants of the Irani Wadi or tenants-in-common whatever that may be. Irani Wadi is the suit property. It consists of residential house or bungalow, open land which was used as nursery and a number of rooms used by Malis. There are three tenancies in respect of this suit property. All of them were originally standing in the name of Bomanji Irani - the grandfather of the Plaintiffs Nos. 1, 3 4 and 5 and father in law of plaintiff No.2. The owner of the property was obviously the BMC. Therefore, Bomanji was the tenant of the BMC. [unless otherwise referred to , the suit property will include these three tenancies hereinafter]. Defendant No.2 claimed that in 1961, Smt.Daulatbai and all others, who were representing their respective branches, were alive. They gave no objection for transferring the tenancy in his name exclusively. Therefore, he became entitled thereto i.e. for transferring the tenancies of the suit property in his name.

According to him, the BMC transferred the tenancies in his name and since the land was acquired by the BMC, he surrendered it and when the lease was granted to him, he developed. According to him, therefore, there is nothing illegal in transferring the tenancies in his favour. The BMC who is supporting him came with a case that their action in transferring the tenancies in the name of defendant No.2 was bonafide and it is an official and administrative act without any malafide.

3. It is to be noted here that transfer of tenancy took place on 18.9.1981 whereas the consent letter for that purpose is dated 25.10.1961. Second contention of defendant No.2 was that Bomanji Ardeshir had executed a Will dated 15.10.1934 and by clause (9) of the said Will appointed his wife Dowlat to be the residuary legatee of the Will. Daulatbai thereafter before her death made another Will and bequeath the property to defendant No.2 and, therefore, the defendant No.2 has become exclusive tenant of the suit property.

4. The third contention of defendant No.2

was that out of the three tenancies in the Irani Wadi, he was occupying part of the suit bungalow and he was exclusively looking after the business of nursery since long without any interruption and contribution by the plaintiffs. So also he was exclusively looking after the other tenancies i.e. residential rooms of the Malis or gardeners without any interruption and contribution by the plaintiffs and the defendants who are supporting the plaintiffs and, therefore, apart from no objection certificate of 1961, he had an independent right in the Nursery or area covered by Nursery and over the rooms occupied by the Malis.

5. The next contention of defendant No.2 and supported by the BMC was that the suit for declaration was barred by limitation as it was not filed within six months as required by Section 527 of the BMC Act. In addition, the BMC contended that there was no notice under section 527 of the Act and, therefore, the suit was barred by limitation. They also contended that there were no malafides on their part in transferring the tenancies in the name of defendant No.2.

6. I have deliberately stated the case of defendant No.2 in the beginning because prior to the transfer it was the joint property in the name of Bomanji and since the defendant No.2 is harping on and banking upon the letter Exhibit B dated 25.10.1961 i.e. the consent letter given by all it was necessary to state his case first.

7. So far as the plaintiffs are concerned, their contention was that they had given this consent letter for the purpose of enabling all of them to pay rent regularly because the rent receipt should be in the name of one instead of all. However, according to them and, as per the consent letter dated 25.10.1961 (Exh.B). [hereinafter referred to as the consent letter], all heirs of Bomanji had agreed to pay rent jointly every month and they were paying it regularly. According to the plaintiffs, this consent letter was given for the sake of convenience and did not amount to transfer of tenancies or their interest in the tenancies of the suit property or tenancies of all the three portions of the suit property. They had in fact, soon after writing the consent letter, not only

informed the BMC, not once, but repeatedly by number of letters raised objections in this regard. According to the plaintiffs, this consent letter dated 25.10.1961 was given for one more additional reason and, that is, a notice given by the BMC vide Exhibit A collectively to all the legal heirs of Bomanji viz Smt.Daultbai Bomanji; Shri Dinshaw Bomanji, Shri Jehangir Bomanji, Ardeshir Bomanji, Shri Framroz Bomanji and Shri Homy Bomanji asking them to quit and deliver vacant possession of the premises.

8. It is further the case of the plaintiffs that even though the consent letter was written in 1961 the tenancy was not so transferred for quite a long time i.e. for about two decades. But when they learnt in 1975 that it was so being transferred in the name of defendant No.2 they started writing letters to the BMC protesting about transfer and bringing real fact to the notice of the BMC. There are four letters in this regard. They are dated 14.8.1975, 22.12.1980, 22.10.1981 and 28.10.1982. According to the plaintiffs, these letters clearly shows that as to what was the intention of the parties; what steps they had taken to prevent the transfer

of tenancy in the name of defendant No.2.

9. Another most important aspect that was pleaded by the plaintiffs in support of their contention is the filing of the suit in the City civil Court vide Suit No. 5451 of 1963. This suit was filed by Daulatbai Bomanji, Ardeshir Bomanji, Jehangir Bomanji, Framroze Bomanji, Dinshaw Bomanji and Homi Bomanji against the BMC and its authorities for a declaration that three orders passed under Section 105(B) of the BMC Act were illegal, invalid and for perpetual injunction against the corporation. This suit was contested by the BMC. It ultimately came to be decreed by a judgment dated 11.7.1977 and the three orders so challenged were quashed and permanent injunction was granted against the BMC in enforcing the order of eviction of the plaintiffs in that suit.

10. The plaintiffs relied upon this earlier suit to substantiate their contention that even though the consent letter was executed by them in favour defendant No.2, it was only for the sake of convenience and all the heirs of Bomanji who signed the consent letter had right, title and

interest in the property and, they did not and never surrender their rights. By filing of a joint suit and a combined suit in 1963 as stated above and, decreeing the said suit in 1977 confirms this fact.

11. Since transfer of tenancy is the basic issue in this case, it has to be decided first.

12. The four letters relied upon by the plaintiffs, as stated in para 7, are dated 4th August 1975 - Exhibit B Colly., 22nd December 1980 - Exhibit A, 22nd October 1981 - Exhibit B Colly. and 28th October 1982 - Exhibit C. I will go by Exhibits numbers. The first letter is Exhibit A. It is written by the advocate for the plaintiffs for and on behalf of Homi Irani, Tehmtan Irani and Pesotan Irani. 2nd letter is Exhibit B-Colly dated 4th August 1975. It is jointly written by Dinesh Bomanji, Ardeshir Bomanji, Jehangir Bomanji and Homi Bomanji. The 3rd letter is dated 22nd October 1981 (Exh.B colly.). It is written by P.H.Irani - Heir to Late Jehangir Bomanji Irani. The 4th letter is Exhibit C dated 28th October 1982. It is written by the advocate Mr.B.L.Sequeira. It is written

for and on behalf of 12 persons i.e. all the heirs of Ardeshir and Homi Irani. In all these letters, there is an assertion of joint tenancy, joint occupation and enjoyment of the suit property. This assertion, coupled with the fact of filing of the suit, as referred to above, by all the five persons including Daulatbai, strongly supports the case of the plaintiffs that the consent letter, given for transfer of tenancy in the name of defendant No.2, was only for the sake of convenience and not for transferring the rights of tenancy forever in favour of the defendant No.2.

13. It is to be noted at this juncture that the transfer of tenancy, as per the defendant No.2 and the BMC, took place on, not even after ten years but after twenty years of execution of the consent letter. That transfer of tenancy actually took place on 18th September 1981. A serious question arises about this transfer, that is, on account of this inordinate delay which creates strong suspicion about the legality, validity and bonafide of the transfer. By the letters proved on record by the plaintiffs to the BMC expressing their apprehension of transfer and

that is up to the date of not only 1981 but even thereafter, they have forewarned the municipal authorities for transferring the tenancy exclusively in the name of defendant No.2.

14. Another serious question arises in this matter and that is required to be considered is, why for and for what reason all the heirs of Bomanji, who had signed the consent letter, should transfer the tenancy in the name of defendant No.2.

15. 3rd question that arises is, whether giving the consent for transferring the tenancy amounts to relinquishment of rights by all those person in the suit property in favour of defendant No.2. The answer to the 2nd question is that there is no relinquishment at all in favour of defendant No.2. The consent letter nowhere shows nor a single document is there with the defendant No.2 to show that the signatory of the consent letter has relinquished, abandoned and given up their tenancy right in the property forever and permanently in favour of the defendant No.2. No such case is put forth by

defendant No.2 at any stage. Further there is no reasons why all other signatories of the consent letter should shower all the benefits of tenancy right exclusively upon the defendant No.2. Nothing is brought on record to show that defendant No.2 had given any privilege to the family or made any sacrifice for the family for which all of them decided to compensate the defendant No.2 by transferring the tenancy. Therefore for all these reasons, it has to be held that transfer of tenancy sought to be achieved by consent letter was only for the sake of convenience. It was not relinquishment of right by other signatories in the suit property. Subsequent conduct of the plaintiff in protesting and apprehending, the delay of 20 years in effecting the transfer are all circumstances that strongly support the case of the plaintiffs and it also disproved the case of the defendant No.2. The plaintiffs have alleged malafides against the BMC in this regard. It is true that the malafides are to be specifically proved against the specific officer but it can be said that the transfer lacks bonafides.

16. Learned counsel Mr.Godbole appearing for

the defendant No.2, tried to urge that because the defendant No.2 was doing of the nursery business and looking after and taking care of the property, the parties had agreed to transfer the tenancy in his name. The question is not of mere transfer but the question is of relinquishment of right and giving up of their rights in the property by other signatories. If the defendant No.2 was wholly looking after the nursery business, then that itself is no circumstance to shower the benefits upon him. There is no evidence, there is nothing on record nor it was pointed out to me that the defendant No.2 did anything special for other signatories in the course of their life or at the time of execution of consent letter or for signing of the consent letter. Therefore the reason tried to be put forth by Mr.Godbole has no force. It has no basis and it has required to be rejected.

17. To conclude at this stage, the trial court has committed serious error in appreciating the evidence and facts. The trial court did not properly appreciate the consent letter. The trial Court also did not properly appreciate the significance of filing of joint suit against the

BMC as stated earlier. The trial court did not consider the importance of delay of 20 years in the so called transfer and also did not consider the effect of all the four letters stated above. The trial court did not consider the letter of apprehension sent by the plaintiffs to the BMC about intended transfer.

18. The so called transfer of tenancy is dated 18th September 1981. The defendant No.2 contended that it is legal and proper transfer. The BMC contends that it is a bonafide transfer. But the letter dated 2.2.1982 (Exhibit 16) written by the Senior Ward Office, E-Ward to Shri P.H.Irani is very vital and crucial document. It falsifies both these contentions of the defendant No.2 and the BMC. The subject of this letter (Exhibit 16) as written in it is "Transfer of rent receipt of C.S.No.266/67 known as Irani Wadi". There is a reference to the letter of P.H.Irani addressed to Shri P.P.Kamdar about the objection for transfer of rent receipt in the name of Dhinshaw Bomanji Irani, i.e. defendant No.2 and, the Sr.Ward Officer, who has written this reply, has stated that any objection does not appear to have been received by E Ward Office

and, therefore, a request was made to P.H. Irani to send a copy of the same letter and, the purpose of asking for the copy is "so as to enable him to decide on the objections on merits." Then copy of this letter (Exhibit 16) was also sent to the Law Office.

19. This letter of 1982 fully supports and fortifies the contentions raised by the learned Counsel Mr.Naik for the plaintiffs that the transfer of tenancy on 18th September 1981 is not bonafide because even as on 2.2.1982, as per the Sr.Ward Officer of the BMC, there was no transfer of tenancy and objections were to be decided on merits thereafter. I have no hesitation in accepting this submission of learned counsel Mr.Naik for the plaintiffs. Therefore, in this background, it has to be held that transfer of tenancy is suspicious and lacks bonafides.

20. The second ground on which the trial court went against the plaintiffs is of limitation. Issue Nos. 17 and 18 were framed in this regard. They are as under :-

"Issue No.17:- Whether the suit of the

Plaintiffs is liable to be dismissed for want of statutory notice under Section 527 of the B.M.C. Act, as alleged by the defendant ?

Issue No.18:- Whether the suit filed by the plaintiffs is barred by the limitation?"

Both the Issues have been decided by the trial court against the plaintiffs. The findings on these issues is there in paragraphs 5 and 6 onwards. About limitation, according to the defendant No.2, the cause of action accrued on the date of transfer and not when the transfer of tenancy came to the knowledge of the plaintiffs. The transfer of tenancy has taken place on 18th September 1981 and, as provided by Section 527 of the BMC Act the suit should have been filed within seven months. But it is filed on 23rd March 1983 and, therefore, it is beyond limitation. The trial Court relied upon the letter dated 18th September 1981 (Exhibit 28) which is about sanctioning the transfer of tenancy in the name of defendant No.2. Further from 11/9/1981 rent receipts were also issued to

defendant No.2 and prior to that they were in the name of Bomanji Irani. In para 10, the trial court has noted the aforesaid letters of the plaintiffs dated 22-10-81, 25-2-82, 18-9-81 and 23-10-81. According to the trial Court, the plaintiffs do not have any specific evidence to show that their knowledge dates back to October, 1982. This approach of the trial court is totally erroneous and wrong. In fact, the letter of the Sr.Ward Officer of the BMC dated 2/2/82 clearly shows that till that date, tenancy was not transferred. Further even though the plaintiffs were repeatedly raising objections to the transfer, the BMC authorities did not care to intimate the plaintiffs at any time after this letter dated 2.2.82 as to when they had taken decision of transfer the tenancy in the name of defendant No.2 or had actually transferred the tenancy in the name of defendant No.2. The date of transfer is 18th September 1981. In view of the letter of the Sr.Ward Officer of the BMC dated 2/2/82, the stand taken by the defendant No.2 is falsified and, therefore, the entire approach of the trial court on the point of limitation is wrong, erroneous and perverse. If there is no official communication to the

plaintiffs about the date of transfer from the BMC authorities or from the defendant No.2, then the contention of the plaintiffs that they came to know about the transfer of tenancy in October 1982 was required to be accepted. The approach of the trial court that knowledge of transfer would not give any cause of action is totally wrong.

21. It was tried to be contended and urged by the learned counsel Mr.Godbole for defendant No.2 that if the plaintiffs were expressing their apprehension about the transfer and raising protest about that by their repeated and frequent letters to the BMC, then they ought to have filed a suit as soon as the apprehension arose. This is a stand without basis. It is true that the plaintiffs could have filed a suit on the basis of apprehension. That does not prevent them from filing the suit after coming to know about the transfer. To the contrary, filing the suit after the transfer was the proper step taken by the plaintiffs. The apprehension gives one cause of action and actual transfer gives another cause of action. Filing of suit after coming to know about the transfer was perfectly within

limitation and the findings of the trial court is, therefore, to be set aside. The suit is within seven months of the date of knowledge. It is filed on 23rd March 1983 whereas the plaintiff got the knowledge in October 1982. It is well within limitation.

22. The next question on the basis of which the suit was dismissed is Issue Nos. 23 and 24. Those Issues are as under :-

"Issue No.23 :- Does Original defendant No.2 prove that the predecessor of Plaintiff Nos. 2 to 4 had relinquished or lost the right of intestate succession to the estate of the deceased Bomanji in view of the averment contained in the latter part of Para 12 of the Written Statement of original Defendant No.2.?"

Issue No.24:- Whether original defendant No.2 proves that the deceased Bomanji had left a Will and if so, whether Daulatbai has inherited any interest in the suit property under the said Will?"

23. Both the sides, learned counsel Mr.Naik for the plaintiffs and, learned counsel Mr.Godbole for defendant No.2, made submissions before me only in respect of Issue No.24.

. Bomanji Ardeshir Irani had executed a Will. It is dated 15th October 1934. Only clause that was strongly relied upon by the learned counsel Mr.Godbole for defendant No.2 is the clause No.9 which states that Bomanji had appointed his wife Dowlat to be the residuary legatee of this Will. Learned Counsel Mr.Godbole for the defendant No.2 contended that if Daulatbai was appointed as residuary legatee, then she becomes the sole tenant of Irani Wadi as a residuary legatee. He, then, contended that Daulatbai, in turn, had executed a Will on 2nd January 1949 and in para 2 thereof she has stated, "I give devise and bequeath the business of Florists carried on at Mazgaon Tram Terminus to my son Dinshaw absolutely subject however to his paying to my daughter Ketayun a sum of Rs.50/- per month so long as she lives. My daughter Ketayun shall have a charge for the said amount on the said business. I do not think anything further would be left out of my estate

and effects; however, I appoint my daughter Ketayun to be the residuary legatee of this my Will."

24. No submissions were made before me either by the learned counsel Mr.Naik for the plaintiffs and learned counsel Mr.Godbole for the defendant No.2 about the legal heirs of Ketayun and what happened, if at all the residuary rights of the property were given to by Daulatbai to Ketayun. Mr.Naik contended that the Will of Daulatbai was not probated and, therefore in any case the defendant No.2 does not get any right under the Will of Daulatbai. Nothing was shown to me that any probate was obtained in respect of the Will of Daulatbai.

25. Considering both the Wills, therefore, it is clear that the suit property does not go to defendant No.2 alone as alleged by him. Therefore, this is a case where neither the consent letter nor the Will gives any exclusive right to the defendant No.2 in the suit property.

26. Learned counsel Mr.Godbole, appearing for the defendant No.2, further contended that as per

this Will of Daulatbai the business of florists carried on in the nursery is exclusively bequeath to defendant No.2. In the absence of probate and proof of the Will this submission cannot be accepted for the aforesaid discussion. If it was so, why defendant No.2 wanted a consent letter from all, why he did not assert his rights independently with BMC and why he did not get the tenancy of nursery in his name during all these years. Alternatively Mr.Godbole contended that the defendant No.2 was exclusively looking after the nursery and the Malis' quarters or rooms. That also does not give him any right of the suit property. The defendant No.2 may have scores of documents in his possession and produced on record to show that he was dealing with the nursery and the Malis' quarters or rooms, but that does not clothes him any right of the suit property or any right superior to that of the plaintiffs. The property is joint property. The transfer of tenancy is totally illegal. Neither of the Wills gives any right to the defendant No.2. Therefore, his rights are at par with the plaintiffs and others.

27. The contention of Mr.Godbole that there

were three tenancies separately and, the suit was mainly for tenancy in respect of bungalow cannot be accepted. Because the plaint is absolutely clear and the prayer made is also clear. The suit is in respect of Irani Wad. Therefore, all the transfer of tenancies of all the three items of Irani Wadi are bound to be hit by ultimate order. Mr.Godbole tried to rely upon Exhibit 75 - the letter dated 1.2.1982 by the defendant No.2 to The Deputy Municipal Commissioner. He tried to contend that this is an assertion by the defendant No.2 over the nursery and 13 Malis quarters. Mere assertion does not give any right and it does not exclude other co-owners from the property. Defendant No.2 may assert anything but he has to prove his right in the court of law. The letter does not prove anything at all.

28. Mr.Godbole also tried to contend that the plea of adverse possession was taken by the defendant No.2, but the Court did not frame any issue. Firstly when the suit was hotly contested, it was open to the defendant No.2 to persuade the Court to frame issue in that regard. Secondly, the pleadings in this regard are to be found in para 20 of the written statement of the

defendant No.2. It is stated by defendant No.2 that since the death of Daulatbai, defendant No.2 is in exclusive possession, management and control of the subject matter in the suit taking enjoying all income on his own account and discharging all liabilities, expenses and obligations in connection with the said property including the payment of rent on his own account as sole tenant thereof till the defendant surrendered the tenancy. My attention was drawn in this regard to Issue No.5 which is as under:-

"Issue No.5 :- Do the Plaintiffs prove that Plaintiff No.1 has been residing in the said residential house since his childhood and continued to reside in the said premises till filing of the suit, as alleged in para 5 of the plaint?"

The findings of the trial court is in the negative i.e. against the plaintiffs. Firstly, that does not help the defendant No.2 in establishing his adverse possession. Secondly, that issue is of no consequence because what is involved is the right of the plaintiff as co-tenant or joint tenant in the entire suit

property. Who was occupied the portion and for what period is totally irrelevant, unless defendant No.2 is able to show, after pleadings, that he was in exclusive possession of Irani Wadi and in enjoyment thereof and that was adverse to the interest of the plaintiffs. There is absolutely no evidence in this case, no pleadings and much less no evidence. To the contrary, filing of joint or combined suit by all, vide Suit No.5451 of 1963 and, its ultimate decision, which came to be filed on 23rd October 1963 and came to be decided on 11th July 1977, clearly falsifies the case of defendant No.2 of adverse possession. Till the date of judgment in 1977 the defendant No.2 did not try to separate his interest from the others in that suit on the basis of his so called adverse possession. The present suit of the plaintiffs from which these appeals have arisen was filed in 1983 within six years of the decision of the judgment on 11th July 1977. Therefore, even firstly there is no specific clear cut plea of defendant No.2 about the adverse possession, secondly, there is no evidence in that regard and thirdly, on the face of it, the plea of adverse possession was not sustainable, because the suit of the plaintiffs

challenging the transfer of tenancies came to be filed in 1983 within six years of the decision of suit of 1963.

29. Regarding the objection about limitation, Mr. Godbole for the plaintiffs contended that Exhibit A - the notice dated 22.12.1980 was the notice under section 527 of the B.M.C. Act and the suit is filed in 1983, therefore, the suit is barred by limitation. I do not find any substance in this objection. Because, that notice was given while the plaintiffs were under apprehension of transfer of tenancy in the name of defendant No.2 and his son Gaive. The cause of action arose firstly when the transfer actually took place and secondly, when the plaintiffs came to know about the same. This aspect I have already dealt with. The plaintiffs have given notice under section 527 of the BMC Act vide notice dated 28.10.1982 (Exhibit - C) and, have, thereafter, immediately filed the suit within limitation. The trial Court, however, while framing the issues appears to have committed a mistake in framing the issue which is as under :-

"Issue No.7 :- Do the Plaintiffs prove that the Notice dated 15-10-1984 copy whereof is annexed to the plaint vide Exh."E" is a valid and proper notice under section 527 of the BMC Act?

That issue is wrong. The statutory notice is at Exhibit C. There is full compliance before filing the suit. Therefore, so far as this appeal is concerned, this appeal has to be allowed.

30. The impugned judgment is in respect of both the suits filed by the plaintiffs. The other suit filed by the plaintiffs, during pendency of the 1st suit was, as stated above, Suit NO.1877 of 1985, wherein a declaration regarding surrender of tenancy was sought. So also creation of lease in favour of defendant No.2 was also challenged and consequential reliefs of injunction claimed. That suit was contested almost on the same point and even though as many as 26 issues were framed, the trial court in para 4 held that since the finding in most of the issues are given in Sister Suit No.1914/83, the court was restricting itself to

the issues Nos.7,10,11,13,14 and 15. Issue No.7 is in respect of notice dated 16/10/1984 as the statutory notice. Issue No.10 is in respect of lease granted in favour of defendant No.2 by the BMC. Issue No.11 is in respect of acquisition of right by defendant No.2 due to construction of bungalow. Issue No.13 is in respect of non-maintainability of 2nd suit in view of the 1st suit. Issue No.14 is in respect of not entitlement of the plaintiffs to represent the estate of Bomanji without obtaining appropriate orders from the competent court with reference to the contentions raised by the defendant No.2. And Issue No.15 is in respect of consequential issues i.e. if the answer to Issue No.14 is in the negative, whether the suit is maintainable. The trial court gave negative findings on Issue Nos.7, 10,11 and gave affirmative findings on Issue Nos. 13 and 14 and held that the suit is not maintainable.

31. In fact, when both the suits were going on simultaneously, a common judgment should have been delivered by the court. In any case the rights and the reliefs claimed in the 2nd suit are based on the 1st suit. When the plaintiffs

succeed in proving that they are the joint tenants then surrender of tenancy by defendant No.2 to the BMC was totally illegal and as a result the plaintiffs are entitled to the consequential reliefs claimed.

32. This matter was kept on board by me on 22nd September 2005. It was found necessary, however, to hear the parties again regarding the 2nd suit of the appellants, the reliefs claimed by them therein and the consequences thereof. Accordingly, I heard all the aforesaid advocates again regarding this point at length.

33. The 2nd suit was filed by the plaintiffs on 26th March 1985. It came to be filed because, as per the plaint para 25, towards the end of September 1984 the Plaintiffs noticed that the son of original defendant No.2 had brought some workmen on the suit property and had started excavating a certain portion thereof. Then he was also seen putting up a compound wall enclosing certain portion of the land. Report was made to Byculla Police Station and, at that time, original defendant No.2, [who was dead by the time of filing the 2nd suit] told at the

Byculla Police Station that the defendant No.1 has granted a lease in his favour in respect of the land which he was enclosing. Then the plaintiff made enquiries; addressed letters to the BMC through their advocate. No reply was received. On 15th October 1984 Original defendant No.2 put up three sign boards notifying that the land was private property of original defendant No.2. Then plaintiffs gave notice etc. and, then the suit was filed claiming declaration that purported surrender of the tenancy of the suit premises by the original defendant No.2 in favour of defendant No.1 is illegal, bad-in-law, not valid and not binding and does not affect the tenancy right of the plaintiffs. And the other declaration that was sought was, the lease granted in favour of defendant No.2 by defendant No.1 is illegal, bad in law, not valid and the defendant No.2 has no right under the said lease to put up any construction on the land under lease. Injunction in terms of prayer clause (d) and (e) were sought from issuing commencement certificate to defendant No.2 etc and from proceeding further with the construction.

34. Then the plaintiffs took out a notice of

motion for ad interim relief against defendant No.2 regarding his construction. The prayers were refused. The plaintiffs came in appeal and in the appeal vide Appeal from Order No.438 of 1988 Justice Pratap passed an interim order on 20th April 1988. What was given to the original defendant No.2 was to proceed with the construction and obtained completion certificate. But till hearing and disposal of the main appeal i.e. the A.O. and ninety days thereafter the defendant No.2 was restrained from creating third party right or parting with possession. This order was in respect of five flats to be constructed by the defendant No.2. Thereafter the main appeal came up for final decision before Justice Savant and by order dated 16th October 1991 Justice Savant expedited the hearing of the suits and the order of Justice Pratap in respect of reservation of five flats was continued to remain in operation as per the order of Justice Pratap.

35. The effect of the A.O. and both these orders of Justice Pratap and Justice Savant is that the defendant No.2 was permitted to carry on the construction pending 2nd suit and he was

directed to reserve five flats. Accordingly those five flats have been reserved.

36. When both the suits of the plaintiffs were dismissed and they filed appeal in this courts, the appellants took out a Civil Application, being Civil Application No.6391 of 1995. Justice Lodha by his order dated 11.12.1995 continued the earlier order in respect of four flats and, regarding 5th flat, liberty given to the heirs of original defendant NO.2 to sell the same or transfer in any other manner subject to the deposit of Rs.40 lakhs within one month . But all these transfers were subject to final decision in the appeal i.e. present appeal before me.

. Then Justice Lodha gave another direction as under :-

"As regards the property in possession of the Appellants, all the parties are directed to maintain status-quo and the Appellant is also directed not to create third party interest in the property in their possession."

. Dis-satisfied with this order of Justice Lodha, original defendant No.2 and his heirs filed LPA which came before the Division Bench and the Division Bench by order dated 16th July 1997 dismissed the appeal giving liberty to the appellants for clarification of the impugned order for a limited purpose. Civil Application No.6391/95 came to be finally disposed by Justice Sakhare by his order dated 1.8.1997 and, Justice Sakhare, after taking note of the order passed by Justice Daud in Civil Application No.6366 of 1987 in A.O. No.438 of 1986, directed the Respondent Nos.1 and 2(a) to 2(d), [Respondent No.1 is the BMC & Respondent Nos. 2(a) to 2(d) are the legal heirs of original defendant No.2], not to disturb the appellants' possession of whatever premises of the main bungalow that be in their occupation. Then Justice Sakhare directed the parties to abide by the order of Justice Lodha with liberty to apply in case the flats were released by the Government. Justice Sakhare also modified the condition regarding the 5th flat and the legal heirs of original defendant No.2 were permitted to give this flat on a leave and licence basis subject to the conditions.

37. When I questioned all the advocates about the prayers and reliefs in the 2nd appeal and consequences of all these orders, Advocate Mr.Godbole, appearing for the original defendant No.2, admitted that the Government has now released those two flats. But he also stated that two flats have been given by defendant No.2 or his heirs on leave and licence subject to the final order in these appeals.

38. Advocate Mr.Naik for the plaintiffs contended that the plaintiffs have 6/15th share in this property. If their both the suits are allowed i.e. both the appeals are allowed and both the suits are decreed as prayed for, the consequence would be that the entire construction carried out by the original defendant No.2 would be illegal. But looking to the fact that a 15 storeyed building has been constructed, the plaintiffs are not asking for its demolition and the plaintiffs would be contended if the five flats reserved are given to them for occupation in lieu of all their rights in the property i.e. Irani Wadi.

39. As against this, Mr.Godbole for the defendant No.2 contended that this cannot be done by the court. Firstly because there was no suit for partition. Secondly, while constructing the new building, it was the defendant No.2 who has spent everything. The plaintiffs did not spend even a single rupee for the new construction. Thirdly, according to him, the plaintiffs did not amend the plaint in the 2nd suit to claim any such relief and, if they had made such a claim for these five flats by amendment of plaint, then the matter would have gone beyond jurisdiction of the City Civil Court. Mr.Godbole also relied upon the judgment of the Supreme Court reported in **AIR 2002 SC 665 [Om Prakash Gupta v. Ranbir B. Goyal]** and contended that even though the court can take note of all the subsequent developments during pendency of the suit but if passing appropriate orders would come in the way of the plaintiffs in getting such relief, then, according to Mr.Godbole, this judgment requires the plaintiffs to amend the plaint and then only to make any such claim.

40. The submissions of Mr.Godbole were supported by Mr.Walawalkar for the BMC. He

pointed out that in the 1st suit, there is no prayer for consequential relief.

41. Mr.Naik for the plaintiffs, in reply to both these submissions of Mr.Godbole and Mr.Walawalkar, contended that this judgment of the Supreme Court favours the plaintiffs more than the defendants and this is a fit case to take the developed circumstances into consideration and to grant the relief to the plaintiffs. According to Mr.Naik, when the 2nd suit goes to the root of the matter i.e. surrender of the consequential lease, then both the suits are to be decreed in favour of the plaintiffs. Then taking into consideration his human approach of not asking for demolition of newly constructed building, their interest should be protected by giving five flats reserved to the plaintiffs.

42. I do not find any substance in the submissions of Mr.Godbole and Mr.Walawalkar that for want of amendment in plaint, the prayers of the plaintiffs, now made, cannot be considered. The 2nd suit was filed by the plaintiffs when they found that original defendant No.2 was

starting with developments of the area. Their reliefs in the suit are in respect of surrender deed and the consequential grant of lease in favour of defendant No.1. From my earlier discussion I hold that the plaintiffs are entitled to all the reliefs claimed in both the suits.

43. However, the question is only of ultimate order that is to be passed in these appeals. So far as objection regarding amendment is concerned, no amendment was necessary because the development has taken place during pendency of the suits by virtue of the orders of this Court in Appeal from Order and all the subsequent orders referred to above. The defendants got the liberty to make construction upon the building pursuant to the court's order. He has been directed to reserve five flats in the construction and, obviously reservation of five flats is to protect the interest of the plaintiffs.

44. In fact if both the suits are to be decreed by allowing these appeals, then the entire transfer of tenancy in favour of defendant

No.2, surrender by defendant No.2 of the entire tenancy to the BMC and grant of lease by BMC to the defendant No.2 in lieu thereof becomes illegal, void, abinitio and has to be struck down. This will definitely affect the present construction made by the defendant No.2

45. Mr.Naik was graceful enough in adopting human approach in this matter and making concession that he does not ask for demolition of building or any order of this court affecting the construction of the present building. Mr.Godbole tried to contend that even if the suits are allowed and decreed as prayed, it will be for the BMC to tackle the situation. There is no substance in this submission of Mr.Godbole. When the matter is before the Court and the Court grants reliefs prayed, it is not the BMC but it is the Court which has to decide about the rights of the parties.

46. The Supreme Court's judgment relief upon by Mr.Godbole favours Mr.Naik more than the defendant No.2 or Mr.Godbole's clients. The Supreme Court has clearly held that the development in the pending suit can be taken into

consideration. In para 11, the Supreme Court has laid down as; -

"However, the Court has power to take a note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied :
 (i) that the relief as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not take by surprise."

Then in the same para the Supreme Court has taken note of the judgment of the Supreme Court in *Pasupuleti Venkateswarlu v. The Motor and General Traders* (AIR 1975, SC 1409) and quoted the judgment of Justice Krishna Iyer as under :-

"However, the Court cautioned : (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed."

47. If the aforesaid tests as laid down by the Supreme Court in this entire Para II are applied, then case of the plaintiffs fulfils all the necessary requirements. The construction of the building by defendant No.2 pursuant to the surrender of tenancy to the BMC and grant of lease by BMC has made the reliefs in the 2nd suit inappropriate. If the note of this subsequent development is not taken, then there is no end to litigation much less shortening the litigation and the third test is that the subsequent event is not only brought to the notice of the Court but it is the order of the Court in A.O. that

has created subsequent development. Therefore, when this development, namely construction of the building, is because of the orders of the Court or permission granted, then there was no necessity for the plaintiffs to amend their plaint in the 2nd suit.

48. Applying the criteria laid down by Justice Krishna Iyer here, the event in this suit is such that will stultify or render inept the decretal remedy. Giving declaration in favour of the plaintiffs as prayed for in the 2nd suit would be of no use because mandatory injunction and permanent injunction asked for in the 2nd suit cannot be effectively granted in view of the huge construction made on the spot.

49. Rules of procedure can be bent if no provision is violated by granting reliefs in the circumstances, there would be no breach of any specific provision. Fair play has to be administered.

50. Mr. Godbole for the defendants contended that the plaintiffs have not spent a farthing for construction and everything has been spent by the

defendant No.2 or his heirs. I am not in agreement with this submission because the surrender of tenancy was obtained by defendant No.2 fraudulently and the BMC did not act bonafide, Defendant No.2 spent for the construction not for charity, he gained profit from itself, out of the construction, he has sold ten flats and earned sizeable profit, that can be inferred and no evidence is required in that regard and in spite of pendency of 1st suit and 2nd suit he carried on construction. Theretofore, whatever he did was full risk and knowledge of consequence.

51. Therefore, this judgment of the Supreme Court fully supports the submissions made by Mr.Naik rather than supporting the submission of Mr.Godbole.

52. When the transfer of tenancy of defendant No.2 is wrong, malafide and fraudulent, then consequently surrender of tenancy by defendant NO.2 in favour of the BMC is illegal, void and not binding upon the plaintiff and, consequently, the lease has to be struck down as illegal, void, abinitio fully. But as submitted by Mr.Naik for

the plaintiff, no order should be passed by this court affecting the existing structure. The plaintiffs have 6/15 right in the property and, according to Mr.Naik five flats, that have been reserved, would be appropriate towards that 6/15 of the right taking into consideration the sale of ten flats by defendant No.2 or his heirs and earning huge benefits from those sale. Mr.Godbole for the defendants tried to contend that single flat is in possession of the defendants but it is their creation and they must suffer particularly when they have sold ten flats and amassed fortune therefrom.

53. As on today the remaining portion of Irani Wadi is acquired by the BMC and they want to develop it. The other portion is allotted to defendant No.2 on lease. Considering, therefore, all the rights of the plaintiffs i.e. 6/15th right in the suit property and the right of the defendant No.2, allotting five flats to the plaintiffs, rest of the 10 flats of the building are with the defendant No.2 and/or his legal heirs, and the corporation developing the remaining property, is the only option left. Once the remaining portion of Irani Wadi is

acquired by the corporation, the plaintiff will have to vacate the same today or tomorrow. Therefore in these circumstances the order that follows is the only order that will be just and proper in my humble opinion.

54. If the court does not take into account the subsequent development, what will be the consequence in the present case ? Both the suits of the plaintiffs will have to be decreed as prayed. So far as declaration in the 2nd suit is concerned, surrender by defendant no.2 of the leased property subsequently by the BMC in favour of the defendant No.2 will become illegal void. But the injunction, mandatory or permanent, regarding IOD construction cannot be given. Even BMC cannot undo what has been done. The BMC cannot order demolition of the building erected and constructed by defendant No.2 or the developer. Therefore, the plaintiffs will get a paper decree in their favour and defendant No.2 will enjoy the building which he has already done. Will litigation end at this juncture ? What remedy the plaintiffs will have ? Because of the Issues between the parties i.e. the plaintiffs and defendant No.2 have been decided

now by the decision of these suit and hence the plaintiffs will not be able to file another suit. And even if they file such a suit, whether that will end the litigation ? The answers to these are in the negative. Therefore, as rightly held by the Supreme Court in the judgement referred to above the Court has to take and should take in consideration the subsequent developments in order that the parties should not require to go for litigation again and again, that all rights arising subsequent to filing of the suits are properly taken care of, interest of both the parties are adequately dealt with and while doing so minimum damage or loss is caused to either of the parties depending upon the situation.

55. For all these reasons I pass the following order :-

:ORDER:

1. Both the Appeals i.e. First Appeal No.970 of 1995 and First Appeal No.1075 of 1995 are allowed.

2. The judgments and decree of the trial court in both the suits are set aside.

3. The 1st suit i.e. Long Cause Suit No.1914 of 1983 is decreed as prayed for.

4. In the 2nd Suit i.e. L.C.Suit No.1877 of 1985 prayers (a) and (b) are granted fully as prayed.

5. The Plaintiffs have right to occupy five flats, kept reserved by virtue of the court's orders, immediately in their right and towards their right in the property without any consideration to defendant No.2 or to the BMC of whatever nature. The defendants to place the plaintiffs in possession of these five flats immediately.

6. Stay on the BMC regarding development of the remaining property i.e. bungalow of the remaining property stands vacated.

7. Defendants to bear all the costs of the plaintiff of the trial court through out as well as this court.

[D.G.DESHPANDE, J]

. After this order was pronounced, advocate for the heirs of original defendant No.2 prayed for staying operation of this order in its entirety. He contended that three flats out of the five flats referred to in the operative order are in occupation and possession of the heirs of defendant No.2 and, two flats are in possession of licensees.

. This prayer is strongly opposed by Mr.Naik on the ground that the possession of heirs of defendant No.2 or of licensees was subject to the result of this appeal. The plaintiffs are fighting this matter from 1983 i.e. more than 22 years have passed. Therefore, prayer for stay is strongly opposed.

. I have already considered the case of both the parties on merits. Handing over of possession of these flats by the heirs of defendant No.2 and licensees is stayed for eight weeks from today. After the appellant gets possession of the flats, as stated above, they

will hand over the possession of present bungalow which is in their possession to the BMC for further development along with land in their possession. Rest of the order to remain as it is.

. Certified copy expedited.

[D.G.DESHPANDE, J]